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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 451

J. W. BARNETT, SR., MRS. J. W. BARNETT, SR.,
AND J. W. BARNETT, JR.

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES EMERGENCY COURT OF APPEALS*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 61-68) is not yet reported.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered on August 29, 1945 (R. 69). The petition for a writ of certiorari was filed on September 24, 1945. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App. Supp. IV, sec. 901, as

amended by the Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess., and by the Act of June 30, 1945, Public Law 108, 79th Cong., 1st Sess. (herein sometimes termed "the Act"), making applicable Section 204 of the Judicial Code, as amended (28 U. S. C. Sec. 347).

QUESTIONS PRESENTED

1. Whether regulations establishing maximum prices for alcoholic beverages may under the provisions of the Emergency Price Control Act be validly applied to sales made in contravention of state prohibitory legislation.

2. Whether the Twenty-first Amendment to the United States Constitution precludes the establishment under the Emergency Price Control Act of maximum prices for sales of alcoholic beverages in states where such sales are prohibited.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act appear in the Appendix, *infra*, pp. 12-21. The maximum price regulation involved in this proceeding is printed in the Federal Register (8 F. R. 11161).

STATEMENT

Petitioners were indicted in the United States District Court for the Southern District of Mississippi for making sales of alcoholic beverages in the State of Mississippi at prices in excess of the maximum prices established by Maximum

Price Regulation No. 445 (R. 20-21). Pursuant to leave granted by the district court under Section 204 (e) of the Emergency Price Control Act, petitioners filed a complaint with the United States Emergency Court of Appeals asserting that the regulation, as applied to sales made in violation of the state prohibition legislation, was invalid under the Act and the Twenty-first Amendment to the United States Constitution (R. 1-5).

Petitioners having elected not to present evidence, respondent moved to dismiss the complaint on the ground that petitioners had failed to establish a right to relief (R. 48).¹ The court below dismissed the complaint, holding that petitioners had failed to establish that the regulatory provisions were in conflict either with the Emergency Price Control Act or the Twenty-first Amendment (R. 61-66). One judge dissented on the ground that the definition of "maximum price" set forth in Section 302 (i) of the Act precluded the application of price control to commodities

¹ Rule 18 (a) of the Emergency Court of Appeals establishes procedures for the presentation of evidence in support of allegations of fact presented in the pleadings filed with the Court. Petitioners failed to apply for leave to introduce evidence in support of their complaint, and indicated that there was no evidence which they wished to submit (R. 57). On application by respondent for leave to present evidence relevant to issues of fact presented by the complaint and answer, petitioners replied that they relied solely upon the issues of law presented by their complaint (R. 57-60).

which may not legally be sold under state law (R. 66-68).

ARGUMENT

(1) Petitioners' principal contention is that sales of intoxicating liquors made in violation of state prohibitory legislation are outside the scope of the Emergency Price Control Act. In support of this contention, petitioners urge that such intoxicating liquors, at least while in the confines of a prohibition state, are not "commodities" as that term is employed in the Act.

The provisions of the Emergency Price Control Act leave no room for this contention. Section 2 (a) of the Act delegates to the Administrator the authority to establish maximum prices for "commodities." In Section 302 (c) the term "commodity" is broadly defined to include "commodities, articles, products, and materials," subject to exceptions for specified commodities and transactions which are exempt from price control. In *The Lincoln Savings Bank of Brooklyn v. Brown*, 137 F. (2d) 228, 230 (E. C. A.), the Emergency Court of Appeals pointed out with respect to the provisions of Section 302 (c) that "This is an extremely broad definition encompassing, we believe, all things possessing the attribute of tangible existence, * * *." Intoxicating liquor, wherever sold, clearly falls within this definition. Moreover, as the opinion of the court below pointed out, since the Act defines the commodities and transactions which are outside the

scope of the Act, it would be plainly improper to add by implication to the list of exemptions specified by Congress (R. 65).

Likewise improper is the attempt to imply an exception for the transactions in question on the basis of the statutory definition of the term "maximum price." In Section 2 (a) the Administrator is granted the authority to "establish * * * maximum prices." Section 302 (i) provides: "The term 'maximum price,' as applied to prices of commodities means the maximum lawful price for such commodities * * *."

We submit that the plain and natural meaning of Section 302 (i) is to complete the thought implied, but not fully expressed, in the grant of authority to "establish * * * maximum prices." In an accurate use of language, the Price Administrator could not be said to have the power to "establish" a "price" or to "establish" a "maximum price," since actual prices and price levels can be established only by buyers and sellers. The only authority which Congress conferred upon the Administrator was the power to prescribe prices which buyers and sellers may not exceed without incurring the penalties prescribed for such unlawful conduct.

Petitioners contend that Congress, by referring to a "maximum lawful price" intended to preclude the application of a maximum price regulation to transactions made unlawful under state law. This construction violates the natural mean-

ing of the words used in the Act, by reading Section 302 (i) as referring not to a "lawful price," but to a lawful *transaction*, and by importing into the definition of "maximum prices" to be established by the Administrator a reference to legality under state law, a thought wholly alien to the basic purport of the statutory provisions establishing a national program of price control.

Moreover, in the absence of compulsion from the terms of the statute, there is no occasion to adopt a construction which, in the words of the majority opinion, "would subject all prices established by the Administrator to a criterion so extreme and incongruous" (R. 64). Thus, if petitioners' construction were adopted, there seems no escape from the consequence that price control could be defeated by making transactions in violation of any of a multitude of state police restrictions. As was pointed out in the opinion below, such an intent may not be imputed to Congress, particularly in view of the absence of any suggestion in the legislative history that such a result was contemplated by the definition set forth in Section 302 (i) of the Act (R. 64).

Petitioners point to provision in the Emergency Price Control Act for certain special types of regulatory action, such as licensing,² which could not

² It may be observed that issuance of a license to sell a commodity under Section 205 (f) of the Act merely confers authority to sell insofar as the Emergency Price Control Act is concerned, and in no wise purports to authorize sales in contravention of the restrictions and prohibitions imposed by local law.

appropriately be applied to liquor in prohibition states. This argument, however, does not lead to the conclusion that regulations establishing maximum prices may not be applicable to such sales. Congress conferred on the Price Administrator a broad array of ancillary powers of limited applicability. It would be plainly erroneous to conclude that the scope of the basic authority to establish maximum prices must be limited to those situations in which all of the ancillary powers could appropriately be exercised.

Petitioners' contention, unsupported by any evidence, that establishment of maximum prices for sales of intoxicating liquor in Mississippi does not effectuate the purposes of the Emergency Price Control Act is without substance. Certainly this proposition may not be deduced, as a matter of law, from the face of the regulation and statute. On the contrary, it is apparent that, as the court below pointed out, the regulation falls squarely within the objective "to stabilize prices" listed at the outset of Section 1 (a), which sets forth the purposes of the Act. The Emergency Court of Appeals has repeatedly sustained the reasonableness of the Price Administrator's determination that inflation in the price of any one commodity threatens the stability of prices for other commodities. *Philadelphia Coke Co. v. Bowles*, 139 F. (2d) 349 (E. C. A.); *Taub v. Bowles*, 149 F. (2d) 817 (E. C. A.), certiorari denied October 8,

1945, No. 195, present Term. Moreover, it is apparent that price control for liquors in Mississippi also serves the purposes of the Act in counteracting the inevitable tendency to market scarce commodities in an area of uncontrolled prices, which would divert liquor supplies from surrounding states and thereby increase the pressure on prices in those states (R. 65). Furthermore, the price controls in question would be appropriate even if the control of prices of intoxicating liquors as such were not within the purposes of the Act, since as the court forcefully pointed out, "Without such price control scarce raw materials and productive effort needed to produce necessities for the armed forces and the public would likely be diverted into the manufacture and production of goods, unnecessary, or not so necessary, to the nation during the period of national emergency" (R. 66).

Section 2 (a) of the Emergency Price Control Act directs the Price Administrator "so far as practicable" to "give due consideration to the prices prevailing between October 1 and October 15, 1941 * * *." Petitioners have contended that this requirement prevents the Price Administrator from establishing maximum prices for sales of intoxicating liquors in Mississippi on the ground that there was no legal market price to which he could refer. But no evidence was offered to show that there was no prevailing price for intoxicating liquors in Mississippi during

this period. In any event, as the opinion below pointed out, the duty imposed on the Price Administrator by Section 2 (a) is merely to ascertain prevailing prices "so far as practicable"; inability to ascertain prevailing prices in only one state plainly would not invalidate a regulation.

(2) Petitioners urge that application of the maximum price regulation to sales in Mississippi, even if authorized by the Act, is barred by the Twenty-first Amendment to the Constitution. As the court below pointed out, this contention is advanced in the absence of any showing of conflict between the regulation and the state prohibitory legislation (R. 63). Thus, the establishment by the Price Administrator of price ceilings in no wise implies authorization to make sales contrary to state police regulations. Nor did petitioners offer any evidence that application of the nationwide regulation to sales in the State of Mississippi has in any manner interfered with the state prohibition program.³ Indeed, as the court found, the price regulation inevitably tends to operate in aid of the state and federal laws which prohibit importation and sale of liquor in this state, by minimizing the inevitable tendency

³ No suggestion has been made that the authorities charged with enforcing the state prohibition legislation consider the enforcement of the maximum price regulation inconsistent with local law or policy. Cf. *Washington Brewers Institute v. United States*, 137 F. (2d) 964 (C. C. A. 9), certiorari denied, 320 U. S. 776.

of sellers to market a scarce commodity in an area of uncontrolled prices (R. 65).

In the absence of a showing of conflict between the national and state regulations, the only alternative argument open to petitioners is that the Twenty-first Amendment has wholly withdrawn from the federal government authority to regulate intoxicating liquors, a contention which has been decisively rejected by this Court. *United States v. Frankfort Distilleries*, 324 U. S. 293; *Jameson & Company v. Morgenthau*, 307 U. S. 171. Likewise, this Court has had occasion repeatedly to reject the suggestion that the illegality of an act under state law confers an immunity from federal legislation. *License Tax Cases*, 5 Wall 462; *Wainer v. United States*, 299 U. S. 92; *United States v. Sullivan*, 274 U. S. 259; *United States v. One Ford Coupe Automobile*, 272 U. S. 321. Fully applicable to the contention which petitioners now urge is the statement in the *License Tax Cases*, *supra*, as follows:

It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union (5 Wall at 473).

We submit that there is no substance to the suggestion that the maximum price regulation under attack in any way conflicts with the provisions of the Twenty-first Amendment.

CONCLUSION

The case was rightly decided and does not warrant review, particularly in view of the lack of any evidence in the record in support of petitioners' contentions as to the relationship of the state and national regulatory programs. The petition should be denied.

Respectfully submitted.

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Solicitor General.

RICHARD H. FIELD,
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Administration.*

OCTOBER 1945.